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In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS, ET AL., PETITIONERS

v.

LEGAL ASSISTANCE FOR VIETNAMESE
ASYLUM SEEKERS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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This supplemental brief is submitted in response to the Court's order of October 2, 1996, directing the parties to address the applicability to this case of Section 633 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRA) (enacted as Division C of the Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996)), and whether this case is moot.

1. As we explain in our reply brief filed in this Court on October 7, 1996 (at 2-4), Section 633 of the IIRA eliminates respondents' claim that the consular venue policy challenged in this case discriminates in

the "issuance" of a visa on the basis of nationality, in violation of 8 U.S.C. 1152(a)(1). IIRA Section 633 amended the Immigration and Nationality Act (INA) by adding the following language to Section 1152(a)(1):

> (B) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

See 142 Cong. Rec. H11,827 (daily ed. Sept. 28, 1996). Since respondents seek prospective injunctive relief, there is no doubt that the amendment to 8 U.S.C. 1152(a)(1) governs the disposition of this case. In a case seeking prospective relief, a court is to apply the law in effect at the time of its decision. *Landgraf* v. *USI Film Products*, 511 U.S. 244, 273-274 (1994). Moreover, the legislative history of the new provision demonstrates that it was enacted with the understanding that it would govern this very case. See 142 Cong. Rec. H11,068 (daily ed. Sept. 25, 1996) (Rep. Conyers); *id.* at H11,066 (Rep. Smith); 141 Cong. Rec. S6105 (daily ed. May 3, 1995) (section-by-section analysis of bill proposed by Administration containing provision ultimately enacted as Section 633).

2. Respondents have remaining a claim that the consular venue policy is arbitrary and capricious, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), and a claim that the policy violates the equal protection component of the Fifth Amendment's Due Process Clause. The district court rejected those claims, finding them "meritless." Pet. App. 27a n.3. The court of appeals had no occasion to address those contentions, however, since its decision was based solely on Section 1152(a)(1). Nor are

respondents' APA and constitutional claims within the questions presented by the government's petition for a writ of certiorari. They are, rather, presented by respondents as alternative grounds for affirmance of the judgment below.

Enactment of the IIRA has not mooted respondents' APA and constitutional claims, since the alien respondents in Hong Kong remain subject to the consular venue policy, or could be subject to it if they sought to file an immigrant visa application in the future. Enactment of the IIRA therefore has not mooted this case. The IIRA has, however, substantially undermined the APA and constitutional claims, as we have explained in our reply brief (at 4-5, 10-11, 14-15).

As regards the APA claim, the legislative history of the IIRA confirms that, as we have argued (Gov't Br. 18-39; Gov't Reply Br. 4-11), consular venue matters are committed to the unreviewable authority of the Secretary of State. The Conference Report on the IIRA states:

> Section 633—House section 803(a) recedes to Senate amendment 172. This section amends INA section 202(a)(1) to clarify that the Secretary of State *has non-reviewable authority* to establish procedures for the processing of immigrant visa applications and the locations were visas will be processed.

142 Cong. Rec. H10,906 (daily ed. Sept. 24, 1996) (emphasis added); accord H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 270 (1996).

As regards the constitutional claim, respondents have conceded that the aliens in Hong Kong have no constitutional claim at all. Resp. Br. 26. They have

also acknowledged that the aliens' U.S. citizen sponsors would have no constitutional claim if the consular venue policy had been authorized by Congress, in light of Congress's plenary power over aliens. See *id.* at 26, 29-31. Respondents therefore cannot deny that their constitutional argument, even on its own terms, has been eroded by the IIRA. Congress has now confirmed that the Secretary has broad (and unreviewable) authority to make distinctions on the basis of nationality in consular venue matters. See Gov't Reply Br. 14-15.

Moreover, the court of appeals recognized in this case that, under its prior precedent in *Narenji* v. *Civiletti*, 617 F.2d 745, 747-748 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980), the Executive may draw distinctions on the basis of nationality, even among aliens in the United States, so long as the classifications are not wholly irrational. Pet. App. 9a-10a. The court below distinguished *Narenji* on the ground that here, in the court's view, there was a statutory provision, Section 1152(a)(1), "flatly forbidding" classification on the basis of nationality in consular venue matters. Pet. App. 10a-11a. Such reliance on Section 1152(a)(1) is now foreclosed by the IIRA.

Accordingly, even if we assume arguendo that the consular venue policy respondents challenge is properly regarded as classifying on the basis of nationality (but see Gov't Br. 45-48)—and even if we assume further, arguendo, that the standard of constitutional review would be the one applicable to aliens in the United States—then, under the court of appeals' own reasoning, the policy must be sustained if it is not wholly irrational. Plainly the policy is not irrational. The more fundamental flaw in respondents' constitutional claim, however, is that the aliens in this case

are *outside* the United States, and therefore have no claims under the Fifth Amendment with respect to their applications for permission to travel to the United States to seek admission to this country. See Gov't Reply Br. 13.

In sum, the question on the merits on which this Court granted review (the applicability of Section 1152(a)(1) to consular venue matters) has been definitively resolved by legislation. The remaining legal claims in the case, advanced by respondents as alternative arguments in support of the judgment below, are without merit and were properly rejected by the district court. Those remaining claims have been still further undermined by legislation enacted after the court of appeals rendered its decision and after the parties filed their principal briefs in this Court. "While it is true that a respondent may defend a judgment on alternative grounds, [the Court] generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co.*, v. *Epstein*, 116 S. Ct. 873, 880 n.5 (1996). That is especially appropriate here, in light of the intervening enactment of the IIRA. Accordingly, we suggest that the Court vacate the judgment of the court of appeals and remand the case to that court for further consideration in light of the intervening legislation. See *INS* v. *Elramly*, No. 95-939 (Sept. 16, 1996); *Bureau of Economic Analysis* v. *Long*, 454 U.S. 934 (1981).

* * * * *

For the foregoing reasons, and for the reasons set forth in our reply brief, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. In the alternative, the judgment of the court of appeals should be reversed, for the reasons set forth in our opening and reply briefs.

Respectfully submitted.

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